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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 184.

THE UNITED STATES, APPELLANT,

vs.

JOHN SMITH.

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS.

BRIEF ON BEHALF OF APPELLEE.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
For Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14650

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PRELIMINARY STATEMENT.

The United States appeals from a judgment of the Court of Claims for $376 in favor of John Smith, who was the petitioner or claimant in the court below.

Smith, the claimant, enlisted November 20, 1897, in the United States Navy as a fireman of the second class, and rendered services under such enlistment until May 26, 1899, when, while serving as fireman, first class, on board the United States ship "Yorktown," a vessel of the United States naval forces, then at anchor in Iloilo harbor, Philippine islands, he was reported to the commanding officer of the vessel "as having refused to do duty," and by that officer immediately ordered to be

put "under sentries as a prisoner in single irons for safe keeping, to await trial by general court-martial."

He was continuously thereafter held such prisoner until July 5, 1899, when, pursuant to orders, he appeared for trial before a general court-martial on board the United States ship "Princeton," at Cavite, P. I. (R., 11).

On the trial he was charged with and found guilty of "refusing to obey the lawful order of a superior officer" (R., 18, 22), a very different and much more serious offense than that with which he was verbally charged when put under arrest.

The sentence of the court-martial, which was approved by the commander-in-chief, who convened the court, and the acting Secretary of the Navy, was that Smith should be confined in such place as the Secretary of the Navy may direct for a period of one year; that he should perform extra police duty during such confinement and lose his pay to the extent of $376, and at expiration of the term of confinement to be dishonorably discharged from the naval service (R., 22).

The naval prison at Mare island was designated as the place of confinement, the period of confinement to date from July 7, 1899 (R., 22).

Smith, having served out his period of confinement and been dismissed, brought his suit to recover from the United States the amount of money which had been withheld from him under the court-martial's sentence, asserting, for reasons which will hereafter appear, that said court-martial was without jurisdiction to try him upon the charge of which he was found guilty, and that the sentence against him consequently was absolutely void.

The majority of the Court of Claims, being of opinion that the sentence of the court-martial was void, held with the claimant and rendered the judgment in his favor from which the pending appeal was taken.

Section 708, Revised Statutes United States, provides that "all appeals from the Court of Claims shall be * * * allowed under such regulations as the Supreme Court may direct." The "regulations" in this regard prescribed by this court provide that such appeals "shall be heard * * * upon the following record, and none other:

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

"2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree." * * *

As these "regulations" have the force and effect of law and have not been modified, it would seem reasonably certain that the "expert testimony" of Judge Advocate General Diehl, "prepared for the purposes of this case at the request of the Department of Justice" in the month of July, 1904 (Appellant's Brief, Appendix A, p. 25), seventeen (17) months after the rendition of the final judgment in the Court of Claims and five (5) months after the appeal had been docketed here, is entirely inadmissible, and neither it nor the many suggestions in appellant's brief, based upon it, are entitled to consideration here. If possible, they have even less relation to the merits of the case than the caustic comments of appellant's counsel on the majority opinion of the Court of Claims (Appellant's Brief, p. 12), or the contemptuous references to the attorneys who appeared for the appellee in the lower court (*Ib.*, p. 22).

STATEMENT OF FACTS.

From the record it appears that on the 20th of November, 1897, the appellee enlisted in the United States Navy as a fireman of the second class, to serve for three years from that date unless sooner discharged by proper authority; that he served under this enlistment, except when confined in the naval prison at Mare island, until the period of his confinement terminated and his dishonorable discharge from the naval service went into effect under the sentence of the court-martial above referred to (R., 11, 20,22).

On May 26, 1899, while serving as a fireman on board the U. S. S. "Yorktown," a vessel of the United States Navy attached to the Asiatic station, and at that time at anchor in Iloilo, P. I., he was reported by his superior to the commanding officer of said vessel "as having refused to do duty," and thereupon the commanding officer awarded him the following punishment: "Put him under sentries as a prisoner in single irons for safe keeping, *to await trial by general court-martial;*" and he was continuously held as such prisoner on said vessel until July 5, 1899, when he was sent, in the custody of a chief master at arms, to appear for trial before a *general court-martial* then convened on board the U. S. S. "Princeton" at Cavite, P. I. (R., 11).

On June 30, 1899, the following charge and specification of charge were preferred against the appellee by Rear Admiral Watson, the commander-in-chief of the United States naval force on the Asiatic station :

"ASIATIC STATION, FLAGSHIP 'BALTIMORE,'
"MANILA, P. I., *June* 30, 1899.

Charges and specifications of charges preferred by Rear Admiral John C. Watson, United States Navy, commanding United States naval force on Asiatic station, against John Smith, fireman, first class, United States Navy.

"*Charge.*—Refusing to obey the lawful order of his superior officer.

"*Specification.*—In that the said John Smith, a fireman, first-class, in the United States Navy, attached to and serving on board the United States steamer 'Yorktown,' at Iloilo, Philippine Islands, having on the twenty-sixth day of May, eighteen hundred and ninety-nine, been ordered by Assistant Engineer Pope Washington, United States Navy, the officer of the deck, to go on duty in the fire-room of said vessel from noon until four hours post meridian of the said day, he having been previously detailed for this duty, did refuse to obey, and did willfully disobey, the said lawful order of his superior officer, the said Assistant Engineer Pope Washington, United States Navy, who was then and there in the execution of the duties of his office.

"J. C. WATSON,
"*Rear Admiral, U. S. Navy, Commander-in-chief*
"*U. S. Naval Force on Asiatic Station.*

"Witnesses: Lieutenant C. Thomas, U. S. N.; Assistant Engineer Pope Washington, U. S. N.; Chief Machinist G. B. Brownbridge, U. S. N."

"I certify that the accused received a true copy of this charge and specification at 10.30 a. m., July 1, 1899.

"DION WILLIAMS,
"*First Lieut., U. S. M. C., J. A.*"

(R., 18–19.)

On the same day the appellee, with other enlisted men of the crew of the "Yorktown," by order of her commanding officer, was ordered in double irons for safe keeping.

Upon the day the charges were preferred, June 30, 1899, said commander-in-chief, by virtue of the authority vested in him as such commander, contained in article 38, section 1624, Rev. Stats. U. S., appointed a general court-martial and ordered it to convene on Monday, July 3, 1899, on board the U. S. S. "Monadnock," at Cavite, P. I., for the trial of such persons as might legally be brought before it (R., 17).

Article 38 of section 1624, referred to, reads as follows:

"Art. 38. General courts-martial may be convened by the President, the Secretary of the Navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President."

Although at the time in question Rear Admiral Watson, with his flagship, the "Baltimore," was at Manila, and therefore "in the waters of the United States," it does not appear that he had any authority from the President to convene such court.

June 30, 1899, Rear Admiral Watson transmitted the charge and accompanying specification bearing that date to First Lieutenant Dion Williams, the judge advocate, and on the following day, July 1, 1899, at 10.30 a. m., a copy of such charge and specification was for the first time delivered to the prisoner, Smith (R., 12, 18, 19).

On July 3, 1899, Rear Admiral Watson ordered said general court-martial to hold its further sessions on board the U. S. S. "Princeton," at Cavite, P. I. (R., 18).

On Wednesday, July 5, 1899, said general court-martial met on said U. S. S. "Princeton," at Cavite, P. I., pursuant to an adjournment taken from Monday, July 3, 1899, and proceeded with the trial of the appellee on the charge and specifications above set forth (R., 12). Upon the same day it found the specification of the charge "proved" and the

appellee "guilty" of the charge, and directed the judge advocate to record the following sentence:

"To be confined in such place as the Secretary of the Navy may direct for a period of one year; to perform extra police duties during such confinement; to lose all pay that may become due him during such confinement, except the sum of three dollars ($3.00) per month for necessary prison expenses, and a further sum of twenty dollars to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy. Total loss of pay amounting to three hundred and seventy-six dollars ($376.00)" (R., 16).

On July 7, 1899, said proceedings, findings, and sentence were approved by Rear Admiral Watson, and the U. S. S. "Yorktown" was designated as the place of confinement of the appellee until an opportunity should offer for sending him to the United States in a public conveyance (R., 17).

On September 6, 1899, the acting Secretary of the Navy passed an order in which, after reciting the proceedings in the case, he said: "The prison at the navy yard, Mare island, has been designated as the place of confinement, the period thereof to take effect from July 7, 1899, the date of approval of the sentence."

Although the prisoner was put under arrest May 26, "to await trial by general court-martial," a court was not ordered, nor was the charge against him formulated until June 30. Although put under arrest for "having refused to do duty," the charge preferred against him more than a month later was for "refusing to obey the lawful order of his superior officer." He was not furnished with a copy of the charges, with the specifications, at the time of said arrest, as required by article 43, section 1624, of the Revised Statutes of the United States, which is as follows:

"Art. 43. The person accused shall be furnished with a true copy of the charges, with the specifications, *at the time he is put under arrest; and no other charges than those so fur-*

nished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge."

On the 27th of December, 1899, the appellee filed a petition in the Court of Claims to recover the pay which had been withheld from him by virtue of the sentence of said court-martial. This petition was subsequently amended three times. The cause finally came on for hearing upon the merits and upon the allegations of the third amended petition (which seems to have been omitted from the record, although the second amended petition is set forth therein, R., 1–2), and, on the 2d of February, 1903, resulted in a judgment in favor of the appellee for $376. From this judgment the appellant prayed and was granted an appeal to this court (R., 27, 29).

POINTS AND AUTHORITIES.

We contend that the general court-martial which tried, convicted, and sentenced the appellee was without jurisdiction of either the person or the offense, and its proceedings were consequently null and void for the following reasons:

I. Because under article 43, section 1624, of the Revised Statutes of the United States for the government of the Navy, the accused, the appellee here, at the time of his arrest, on May 26, 1899, was not furnished with a true copy of the charges and specifications of the offense for which he was then arrested and detained in custody until July 5, 1899, when he was tried, convicted, and sentenced.

II. Because on May 26, 1899, when said offense was committed, and on June 30, 1899, when said court-martial was convened, and on July 5, 1899, when the appellee was tried, convicted, and sentenced, the commander of the fleet who ordered said general court-martial and the squadron under his command were in the harbors of the Philippine islands, which were at that time, and had been since the ratification of the treaty between the United States and Spain, on April 11, 1899, " waters of the United States," and no express authority was obtained from the President of the United States to convene said court-martial, or if any such authority existed, it was not specifically set out in the order convening said court-martial, as required by article 1773, chapter 42, of the Regulations for the Government of the Navy of the United States, published in 1896, which were then in force.

I.

The court below found, and in fact it is conceded by the Government, that on May 26, 1899, when the appellee was arrested and ordered to be confined "as a prisoner in single irons for safe keeping, *to await trial by general court-martial*," he was not furnished with a copy of the charges and specifications of the offense for which he had been arrested and for which he was afterwards tried on July 5, 1899 (R., 11). The charges and specifications show upon their face that they were not prepared and sent to the judge advocate of the court-martial until June 30, 1899, and that no copy thereof was handed to the accused until 10.30 a. m., July 1, 1899, two days before the court convened (R., 18–19). In view of the fact that the commanding officer who ordered

his arrest directed him to be placed in irons to await trial by general court-martial, it cannot be made to appear that on that date he was simply temporarily confined until his offense could be investigated preparatory to his arrest for trial.

The nature of the arrest in this case clearly distinguishes it from the case of *Johnson vs. Sayre* (158 U. S., 109–117), upon which so much reliance is placed by counsel for the United States. In that case, as is pointed out in the opinion of the court, Sayre was taken into custody to await the result of a board of inquiry, which under section 1624 of the Revised Statutes and the Naval Regulations could only ascertain the facts and had no authority to try or convict him for any offense against the Naval Regulations which its investigation disclosed. Sayre, as the board found, was not put under *arrest for trial* until the Secretary of the Navy had approved the report of the board of inquiry and had ordered a court-martial to convene to try him. He was then furnished with a copy of the charges and specifications.

In the case at bar the appellee was arrested and confined *for trial*. It is not claimed, and upon the facts set forth in this record it can not successfully be contended, that he was confined by way of punishment or to await an investigation of his offense by his superior officers. The plain provisions of article 43 that "*the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial*," were therefore inexcusably violated.

It necessarily follows that if the accused can be tried *only upon the charge furnished at the time of his arrest*, if *no* charges were furnished him at the time of his arrest, for trial on May 26, 1899, there were none in existence upon which he could have been legally tried on July 5, 1899. There was on that date no charge nor specification of charge before the court to give it jurisdiction of the offense. On May 26 he was

reported for "having refused to do duty." Without investigation or delay, and without any "altercation at the mast," he was ordered to be put under sentries as a prisoner in single irons, "to await trial by general court-martial."

This was not in accord with the provisions of section 1034 of chapter 23 of the Naval Regulations of 1896 then in force, which reads as follows:

"1034. (1.) In order to avoid unnecessary recourse to courts of inquiry and general courts-martial, it is directed that where an officer or other person shall be reported for grave misconduct to his immediate commanding officer, the latter shall institute a careful inquiry into the circumstances on which the complaint is founded. To this end he shall call upon the complainant for a written statement of the case, together with a list of his witnesses, mentioning where they may be found, and a memorandum of any documentary evidence bearing upon the case which it may be in his power to produce.

"(2.) He shall also call upon the accused for such counter-statement or explanation as he may wish to make, and for a list of the persons he desires to have questioned in his behalf."

On May 26 he was charged with a simple offense, the punishment of which was within the competency of the captain of the vessel or of a summary court-martial. On July 5, having been continuously under "arrest for trial," he was required, before a general court-martial, to respond to the grave charge of "refusing to obey the lawful orders of his superior officer," the prescribed punishment for which is "death, or such other punishment as a court-martial may adjudge."

He was arrested and charged with a misdemeanor. He was tried and convicted of a felony, and the indictment upon which he was tried was not furnished at the time of his "arrest for trial."

The failure to furnish him with a copy of the charge, as required by the statute, is not a mere *irregularity in pro-*

cedure which may be waived, and which generally is not subject to review, but is a *jurisdictional defect*, which renders the action of the court-martial void and opens its sentence to attack in any collateral proceeding which may be instituted in any civil tribunal.

The law upon this subject is succinctly stated in the leading case of *Dynes vs. Hoover* (20 How., 65, 81–82), as follows:

"Persons, then, belonging to the army and navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment. In England, it has been done by the civil courts, ever since the passage of the Mutiny act of William and Mary, ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England, that this court said, in Wise *v.* Withers, 3 Cr., 337, that in such a case 'the court and the officers are all trespassers.' When we speak of *proceedings* in a cause, or for the organization of a court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence of law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law."

The following extract from the recent case of *McClaughry vs. Deming* (186 U. S., 49, 62–63) shows that the principles established by *Dynes vs. Hoover* have never been departed from in this court, and that a court-martial has always been regarded as a tribunal of limited powers—the creature of statute—whose proceedings must strictly conform to the statute in order to possess any validity.

"A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is

without jurisdiction. It was said by Mr. Chief Justice Waite in *Runkle v. United States*, 122 U. S., 543, 555:

"'A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose, and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev., sec. 470; *Brooks v. Adams*, 11 Pick., 441, 442; *Mills v. Martin, supra; Duffield v. Smith*, 3 S. & R., 590, 599. Such, also, is the effect of the decision of this court, in *Wise v. Withers*, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet., 193, 209, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; *that all the statutory regulations governing its proceedings had been complied with*, and that its sentence was conformable to law. *Dynes v. Hoover*, 20 How., 65, 80; *Mills v. Martin*, 19 Johns., 33. *There are no presumptions in its favor, so far as these matters are concerned.* As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*, 8 Pet., 112, 115, in respect of averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' *All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout.* The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

While it is true that in *Keyes vs. United States* (109 U. S., 336), relied upon by the appellant, it is held that where, as in that case, it is undisputed that "the court-martial as a general court had cognizance of the general charges made and had jurisdiction of the person," *irregularities* or *errors in the proceedings* could not be questioned in a col-

lateral way, Mr. Justice Blatchford distinctly says that "where there is no law authorizing the court-martial, or *where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.*"

And in *Ex parte Reed* (100 U. S., 13, 23), where this court found "there was no defect of jurisdiction as to anything that was done," it was also held that "every act of a court beyond its jurisdiction is void." See also Runkle's case (122 U. S., 543, 555–556).

The failure to furnish the appellee with a copy of the charges and specifications on May 26, 1899, the time of his arrest and confinement for trial before a general court-martial, was not only a violation of article 43, section 1624, of the Revised Statutes, but was also a violation of section 2, chapter 42, article 1778, of the Naval Regulations for 1896, which provides:

"When, therefore, such competent officer shall decide to have a party tried by court-martial, he will cause such charges and specifications against him to be prepared as he may consider proper *and will transmit a true copy of them with an order for the arrest or confinement of the accused to the proper officer, who will deliver such order to the accused and will carry it into effect by delivering to him a copy of the charges and specifications*, and if an officer by receiving his sword."

This section of the regulations plainly refers to both officers and men and requires that both shall be furnished with a copy of the charges and specifications at the time of the arrest *or* confinement, and contains the additional provision that where the accused is an officer his sword shall be taken from him.

The meaning of this section of the Naval Regulations is made more clear by section 6, article 1819, relating to the trial, which provides:

"Should the convening power authorize the judge advocate to amend legal defects in the charges and specifications

before the accused is called on to plead, it is to be understood that in doing so the judge advocate is strictly responsible that the facts are not changed, nor the legal responsibility weakened. He shall on every occasion communicate to the accused any alterations in the charges *which were delivered to him at the time of his arrest*, as soon as possible after such alterations shall have been made."

Counsel for the Government, in attempting to strengthen the apparent weaknesses in their case, have attached to their brief as an appendix an argument of the judge advocate general of the navy based upon the practice of the Department and the Naval Regulations for 1900. Those regulations are not applicable to this case, and we submit that a practice or custom of the Department, no matter how long continued, which is contrary to the express provisions of the statute, cannot have the force of law nor make valid acts otherwise illegal. The *ex post facto* opinion of the judge advocate general, which it is attempted to inject into this record in an irregular manner, is not entitled to any more consideration than his oral statement before the bar of this court would be if he attempted to testify here as a witness upon appeal.

Counsel for the appellant strenuously insist that the appellee waived the failure to furnish him a copy of the charges and specifications at the time of his arrest because he pleaded not guilty, stated that he did not desire counsel, and that he had no objection to any member of the court.

If the failure to comply with the express provisions of the statute and regulations constituted a mere irregularity in procedure, there might be some basis for the Government's contention; but if such failure amounted to a jurisdictional defect, as we insist, it could not have been waived by any action of the accused. The following quotation from McClaughry *vs.* Deming (186 U. S., at page 66) is peculiarly applicable upon this point:

"But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. His consent had no effect whatever in the face of the statute which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial."

In this case the Navy Department desires to torture the simple and frank conduct of a friendless and helpless seaman, who had been under arrest and in irons for six weeks, who had had no copy of the charge against him submitted for his examination until two days before his trial, who had had no opportunity to retain counsel for his defense, who was chained to a ship thousands of miles away from home, and completely under the control and at the mercy of his accusers, into a waiver of defenses jurisdictional in character and such as would be most unlikely to suggest themselves to his limited intelligence.

Section 4, article 1805, of the Naval Regulations relating to the duties of the judge advocate, provides:

"Justice being the object for which a court is convened, the judge advocate, although he is not for a moment to forget his duties as prosecutor, will at all times *prevent* the accused, if he is not assisted by counsel, from advancing anything which may tend either *to criminate him or prejudice his*

cause, more especially if he shall appear to be ignorant or inexperienced. Should the accused have no competent adviser the judge advocate shall also see that no illegal testimony is brought against him, and shall direct him how to present to the court, in the most efficient manner, the facts upon which his defense is based."

In this case the judge advocate, instead of assisting the appellee, an untutored fireman, who was not represented by counsel, to make the necessary objections to the formation and jurisdiction of the court and the failure of his accusers to comply with the statute and regulations, permitted him to make admissions and adopt a course of conduct which are now invoked to his prejudice.

A waiver made unintentionally or without knowledge of one's rights is not binding (*Bennecke vs. Insurance Company*, 105 U. S., 359). In criminal cases the doctrine of waiver by the accused of his statutory or constitutional rights is applied to a very limited extent (Cooley's Constitutional Limitations, 7th ed., p. 252).

In the civil courts the seamen upon our merchant vessels are regarded as "wards of the admiralty" and their rights are jealously guarded. Can this country afford to deny to the seamen who man its ships of war and sacrifice their lives for their country's good the measure of justice and equality which it insists upon for the crew of a fishing smack upon the banks of Newfoundland? No better argument of this matter could be presented than that made by Chief Justice Nott in disposing of the demurrer in this case in the court below. Said he:

"Mariners, whether in the merchant service or in the navy, are, in the words of Story (1 Eq. Juris., 332), 'a strangely improvident class of men, who seem to have mixed up in their character qualities of very opposite natures, and who seem, from their habits, to require guardianship during the whole course of their lives, having at the same time great generosity, credulity, extravagance, heedlessness, and bravery.' 'Courts of equity,' he adds, 'are

always supposed to take an indulgent consideration of their interests and to treat them in the same light with which young heirs and expectants are regarded. Hence it is that contracts of seamen respecting their wages and prize money are watched with great jealousy, are generally relievable whenever any inequality appears in the bargain, or any undue advantage has been taken.' Lord Stowell in the leading case of the 'Juliana' (2 Dodson, 504), held that they should be relieved from the consequences of their own act, that of signing shipping articles whereby their wages might be inequitably forfeited.

"And there is good reason for this; for sailors when on shipboard are beyond the reach of a writ of *habeas corpus;* are without legal advice, and in the preparation of a defense without professional assistance, and on trial they become very near to being practically defenseless; for a judge advocate, like other men, cannot well serve two masters. In courts of equity, and in courts of admiralty, and in legislative halls sailors have always been more or less subjects of protective jurisprudence or protective legislation, and to deprive a seaman of his wages one must proceed according to law and equity. In civil life a man cannot be deprived of life, liberty, or property, except by due process of law. In the army and navy the proceedings are different, the safeguards are less assured, but the principle is the same. Neither Congress nor the courts have ever sanctioned arbitrary arrests or illegal imprisonment or the deprivation of a statutory right. And among the statutory rights which the military or naval prisoner has is that of being promptly informed of the offense whereof he stands accused. An entry on the log is not notice to the prisoner, for he has not access to the log. In the present case the seaman has been deprived of his wages; that is to say, of his property, and this court cannot say that it has been done according to the plain and just purpose of the statute, which was intended to guard the personal rights of officers and men in the navy" (R., 8).

II.

The second proposition upon which we rely arises upon the face of the record and goes directly to the jurisdiction of the court-martial.

Under the decisions in the Insular cases it seems that there can be no doubt that after the ratification of the treaty of peace between the United States and Spain, on April 11, 1899, the Territory of Porto Rico and the Philippines ceased to be foreign land and became territory of the United States.

De Lima vs. Bidwell (182 U. S., 1).

Dooley vs. United States (182 U. S., 222, 234; 183 U. S., 151).

Fourteen Diamond Rings vs. United States (183 U. S., 176).

In the last-mentioned case the Chief Justice, in delivering the opinion of the court, said:

"The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, 'cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.' *Thorington vs. Smith*, 8 Wall., 10. The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.

* * * * * * *

"No reason is perceived for any different ruling as to the Philippines. By the third article of the treaty Spain ceded to the United States 'the archipelago known as the Philippine Islands,' and the United States agreed to pay to Spain the sum of twenty million dollars within three months. The treaty was ratified; Congress appropriated the money; the ratification was proclaimed. The treaty-making power, the executive power, the legislative power, concurred in the completion of the transaction.

"The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be a foreign country. They came under the complete and absolute sovereignty and dominion of the United States,

and so became territory of the United States, over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States and they became entitled to its protection.

"But it is said that the case of the Philippines is to be distinguished from that of Porto Rico because on February 14, 1899, after the ratification of the treaty, the Senate resolved, as given in the margin (pp. 179–180), that it was not intended to incorporate the inhabitants of the Philippines into citizenship of the United States, nor to permanently annex those islands.

"We need consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two-thirds of a quorum: and that it is absolutely without legal significance on the question before us. The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

"It is further contended that a distinction exists in that while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

"We must decline to assume that the Government wishes thus to disparage the title of the United States, or to place itself in the position of waging a war of conquest.

"The sovereignty of Spain over the Philippines and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her or that uncivilized tribes may have defied her will did not affect the validity of her title.

She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant.

"If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected.

"We do not understand that it is claimed that in carrying on the pending hostilities the Government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable."

If the soil of the Philippines is the territory of the United States, the harbors, bays, and other indentations of the coast, to a distance of three miles from the shore, necessarily become "waters of the United States" within the meaning of article 38, section 1624, of the Revised Statutes of the United States, hereinbefore quoted.

In *Huus vs. New York and Porto Rico Steamship Company* (182 U. S., 392) this court held that the ports of Porto Rico became ports of the United States after the ratification of the treaty of peace.

In *Gonzales vs. Williams* (192 U. S., 1, 14) it was held that under the immigration laws Gonzales, a native of Porto Rico, seeking entrance into the ports of the United States, was not a passenger from a *foreign* country, but was a passenger from a territory or other place subject to the jurisdiction of the United States.

The offense for which the appellee was arrested and confined occurred in the harbor of Iloilo, a harbor of the Philippines, May 26, 1899, six weeks after the ratification of the reaty of peace between the United States and Spain (R., 13).

The order convening the general court-martial was issued from Manila, P. I., on June 30, 1899 (R., 17), and the court was held on the U. S. S. "Princeton" at Cavite, P. I., on July 3–5, 1899 (R., 18).

The order of Rear Admiral Watson convening the court recites: "By virtue of the authority vested in me as contained in article 38, section 1624, title XV, chapter 10, of the Revised Statutes of the United States, a general court-martial is hereby ordered to convene," &c. (R., 17).

This article, as has already been pointed out in the statement of facts, provides that "no commander of a fleet or squadron *in the waters of the United States* shall convene such court without express authority from the President."

In addition to the provisions of this article, the Naval Regulations, published in 1896, bearing upon this subject are as follows:

"If, in the opinion of the commander-in-chief or senior officer present, a trial by court-martial is necessary, and the alleged wrong shall have occurred within the waters of the United States, he shall submit a succinct report of the case, together with all the correspondence relating thereto, to the Secretary of the Navy, *unless, as commander-in-chief of a fleet or squadron within the waters of the United States, he be expressly authorized by the President to order courts-martial.* Officers empowered to order courts-martial will in such case proceed at once to prefer charges against the offender and convene a court for his trial."

Chapter XXIII, section 4, article 1064.

"Commanders of fleets or squadrons *serving in the waters of the United States*, although not empowered to order general courts-martial, except by express authority of the President of the United States, are expected on the occurrence of any matter serious enough in their judgment to require thorough investigation, to order a court of inquiry as soon as practicable, and on the proceedings being closed, to submit them by the earliest opportunity to the Secretary of the Navy, in order that he may act advisedly in any course he may think proper to pursue."

Chapter XL, section 1, article 1720.

"(1.) General courts may be convened by the President, by the Secretary of the Navy, or by the commander-in-chief of a fleet or squadron.

"(2.) The exercise of this power by commanders-in-chief within the waters of the United States is forbidden except by express authority from the President; but this authority is usually granted, *and whenever exercised the fact of express authorization must be stated in the convening order.*"

Chapter XLII, section 1, article 1773.

The rear admiral who convened the court-martial in this case had no express authority from the President, and, as appears from the recitals in his order, did not pretend to have any such. It is evident that he regarded himself as upon a foreign station and not *in the waters of the United States.* Without such express authority from the President, nevertheless—and if any existed it must have been recited in the order convening the court—Rear Admiral Watson had no power to lawfully assemble such a court, and all proceedings taken and acts done by the court pursuant to such order were *coram non judice.*

It is therefore respectfully submitted that the sentence imposed upon the appellee by the general court-martial was void for want of jurisdiction of both the person and the offense, and that the judgment of the Court of Claims awarding him the wages of which he was deprived by such sentence should be affirmed.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
For Appellee.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 184.

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SUPPLEMENTAL STATEMENT ON BEHALF OF THE APPELLEE.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15389

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(NOTE.—"N. R." herein refers to the Navy Regulations of 1896, which are identical with those of 1900, except that the latter added article 1077 (2) after litigation for seamen had begun, thus seeming to change the meaning of the regulations.)

1. The meaning of "charges" and "arrest" in article 43, Revised Statutes, 1624, becomes plain on tracing the origin of article 43 back to the British Articles of War of 1765, section 15, articles 17, 18, and 19. These, in force at the beginning of our Revolutionary War, read:

"* * * Whenever any officer or soldier shall commit a crime * * * he shall be put in arrest * * * till he shall be either tried by a court-martial or * * * dis-

charged. * * * No officer or soldier * * * shall continue in his confinement more than 8 days, or until * * * a court-martial can be assembled. No * * * guard * * * shall refuse to receive or keep any prisoner committed by any officer * * * which officer shall, at the same time, deliver an account in writing, signed by himself, of the crime with which said prisoner is charged."

Articles 24 and 43, Revised Statutes, 1624, read:

"No commander shall inflict * * * arrest or confinement * * * longer than 10 days, unless a further period is necessary to bring the offender to trial by a court-martial. * * * The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest."

These British articles of 1765 are repeated successively in—

The Massachusetts articles of April 5, 1775.

The American articles of June 30, 1775.

The American articles of September 20, 1776.

The American articles of May 31, 1786.

(The above are quoted in Winthrop's Military Law, 1896, pp. 1475, 1483, 1500, 1506.)

Being carried through the later acts of Congress, these now appear as article 67, Revised Statutes, 1342. Green Bag for November, 1902, p. 520.

The first Congressman who sat down to write the first American Naval Code must have read the existing military code in framing article 38 of the act of April 23, 1800. The army's specific "account of the crime charged" was the navy's "charges, with the specifications." Notice of these was required to be given not only to the jailor, in reach of the prisoner, but to the accused himself. The furnishing of the specific "account" did not await a second fictitious arrest

of a person already in arrest—a second nominal arrest many months later.

2. To prevent any Secretary of the Navy, like Stanton, from continuing arrests like that of General Stone, in 1861–1862, Congress, on July 17, 1862, brought the "officer ordering the court" within the restrictions theretofore only on the "person demanding" (36 C. Cls., 320, 322).

3. Who was intended by the legislation of July 17, 1862, to furnish charges? The accuser who ordered the arrest. On the same July 17, 1862, Congress enacted article 71, Revised Statutes, 1342, providing that when one is "put in arrest for the purpose of trial, the officer *by whose order he is arrested* shall see that a copy of the charges on which he is to be tried is served upon him within eight days." The arresting officer was not the "officer ordering the court" (article 72, Revised Statutes, 1342). On the same July 17, 1862, also, Congress limited the discretion of naval commanders to determine what was "at the time," of an arrest for trial, to ten days. In the navy an arrest continued ten days is conclusively presumed by law (by article 24, Revised Statutes, 1624) to be an arrest for trial. Within ten days what was "at the time" was a question of fact (N. R., 1036).

Is it possible that on the same day Congress made such contradictory enactments as limiting arrests without notice of trial to eight and ten days, and at the same time indefinitely postponing the service of charges in the navy to a second merely nominal re-arrest at discretion? If that was the object, to provide for arrests like General Stone's, why did not a single Democrat object in Congress?

4. The Navy Regulations of 1896 themselves confess the needed construction of article 43 as to *officers*, refusing to recognize that article 43 says "persons," not, like the army's article 71, Revised Statutes, 1342, "officers" only. These regulations, pages 203–204, read:

"1034. * * * When an officer *or other person* shall be reported for grave misconduct [*i. e.*, charged in a report] to his immediate commanding officer, the latter shall * * * call upon the complainant for *a written statement* * * * [and] upon the *accused* for such counter-statement * * * as he may wish to make."

[How can the accused make a counter-statement unless he gets a copy of the "written statement" of the charge with its specifications? This, as will be seen from articles 1035, 1039, is given only to "officers."]

"1035. * * * Officers to whom such *reports* or *complaints* are submitted for statement must not reply by making *countercharges*. Officers desiring to *prefer charges* against others should make them independently.

"1039. Whenever an accusation is made against an officer * * * a copy of such * * * *shall be furnished at the time* to the officer *accused*.

"1037. If * * * the commanding officer shall be satisfied that the *charge* is such as to call for judicial action, he shall transmit to the Secretary * * * or Commander-in-chief * * * a particular statement of the misconduct with which the accused is *charged* * * * [*i. e.*, charges and specifications]." The charges are then framed for trial, and notice of their statement given the accused by a second copy.

Military accusations and "charges" are thus the same. A "complaint" constitutes the "charges and specifications" in rough form. A "report contains charges" (index to N. R. of 1896, p. 496) and perhaps other things.

5. Secretary Elihu Root "directed" the following explanations, showing that charges may be furnished by any one:

"Military charges, though commonly originating with military persons may be initiated by civilians. * * * So a charge may originate with an enlisted man. * * * Charges proceeding from a person outside the army * * * should be sustained by affidavits. An officer is not disqualified from preferring charges by the fact that he is himself under charges. * * * Held, a sufficient compliance with the requirement as to the service of charges, to have served a true copy of the existing charges and specifications * * * though the charges themselves were not in sufficient legal form and were intended to be amended and redrawn" [*i. e.* "framed"] ("Military Laws," Doc. 545, H. R., 56th Cong., 2d sess., pp. 677, 678, 679).

6. The captain of a war vessel represents the United States. Notice to him, "intelligence of a charge," is notice to the United States and to all intermediate officials, such as the "officer ordering the court." If he ignores a charge and does not furnish it, it is, by the regulations themselves, excluded from the jurisdiction of a court-martial (Navy Reg. (1896), pp. 203, 207, arts. 1034, 1036, 1060).

7. Were there any doubt, a court must "select that construction which best comports with the genius of our institutions" (162 U. S., 218; American Law Review, Sept.–Oct., 1903, pp. 696–702). What that "genius of our institutions" is has been reiterated by successive Secretaries of State for the benefit of American citizens in foreign countries, almost in the very words of article 43:

"That an *accused person shall* immediately upon *arrest* be informed of the *specific* offense upon which he is held * * * are essentials to every criminal prosecution, necessary alike to the protection of innocence and the ascertainment of

guilt" (Secretary of State to James Russell Lowell, Minister to England, June 2, 1881).

"It has, from the very foundation of the Government, been its aim that its citizens abroad should be assured of the guarantees of law, that *accused persons* should be apprised of the specific offense with which they might be *charged*" (Secretary Evarts to Aristarchi Bey, Dec. 8, 1877).

2 Wharton's International Law Digest, 443, 453.

Albany Law Journal, Oct., 1903, pp. 305–307.

8. In Johnson *vs.* Sayre, 158 U. S., 117, the accused was tried on a "new charge," which took a court of inquiry to get "intelligence" of. The case came within the exception to article 43.

There was nothing for the court to construe in this case but what was a "reasonable time to make his defense." The court held that four days was enough, and that it was doubtful whether he could plead that he had not had time to make his defense, when he had already made it. The court said:

"Art. 43 * * * refers to the time when he is arrested for trial [and punishment on a charge] and not to the time of any previous arrest * * * by way of punishment" [on the same charge].

The court did not mean to hold that there could be two successive punishments on the same charge by the naval authorities (177 U. S., 160). The theory that two or more successive arrests for trial on the same charge was meant to be endorsed is therefore untenable.

9. The court was betrayed into a vagueness of language in 158 U. S., 117, by the unexplained regulation in the footnote, page 112. The mystery of this is revealed in the Navy

Regulations of 1865, paragraphs 1203, 1213. These provided that the arrest of an officer (only) should be deferred until just before trial, because of the frequent complexity of the charges against him and because the Navy Department of 1865 commanded a stringent compliance with article 43, even as to the wording of the charges. Right as to the necessity of furnishing charges on arrest, the Navy Department was wrong in its stringency as to the language in which the charges were made. That could have been altered, and the Navy Regulations of 1870 and subsequently said so in the rule now article 1819.

10. Francis Scott Key, author of the "Star Spangled Banner," when Assistant Attorney General, rendered an opinion, June 26, 1839, in a naval court-martial case where the accused claimed that "charges and specifications" were not the subject of restatement by the Secretary of the Navy (Doc. 244, H. R., 1st sess., 26th Cong.). Key said:

"Lieut. Hooe was * * * tried on charges made out and signed by the Secretary of the Navy upon the information of Commander Levy, who, as his commanding officer, had arrested him, and made out charges and specifications, of which a copy was given to him. These being sent to the Secretary of the Navy, were modified and reduced in number. On these he was ordered to be tried. He objected to be tried on these charges, contending that the original charges and specifications could not be in any manner altered or signed by the Secretary, and that he could only be tried on the original charges and specifications as stated by the officer accusing him. * * * The power exercised by the Secretary is necessary and proper, on account of the accused himself, and for all the purposes of justice. The person making charges against, and demanding the trial of a person answerable to martial law, may not be sufficiently acquainted with the form of such proceedings, nor with the nature of military offenses, and the manner in which they should be charged;

and to call a court to try a person for a legal offense, without having the charge against him distinctly stated in legal form would be unjust and unreasonable. If the Secretary sees anything charged as a military offense, which is not so, or which is not sustained by the specifications, he certainly is not bound to send such a charge to a court to be tried. He has an undoubted right, and it is his duty, to examine the charges and specifications, put them in legal form, and if the facts specified maintain the charges, send them to be tried. * * * The words 'nor shall any other charge or charges than those so exhibited be urged against the person,' are not violated here, as the accused supposes. The original articles signed by Commander Levy charge 9 offenses; and the paper on which he is tried contains 3 charges, but those 3 charges are all found among the 9 preferred and signed by Commander Levy—so that no other charge could be urged against him than such as was originally exhibited."

Hooe's claim, that the law cared for the form rather than the substance, the wording of the charges rather than the facts stated in them, is appellant's claim today. It was fitting that this plea for Bastille-like imprisonment should have been overruled by the author of the national song of freedom.

11. The cotemporary executive construction of the act of July 17, 1862, is found in Secretary Welles' regulations of 1865, which follow. What is capitalized is omitted from the regulations of today. What is italicized is the insertion of today. The combination explains the misleading regulation quoted in a foot-note in Johnson *vs.* Sayre, 158 U. S., 112:

"1203. As THE LAW REQUIRES THAT THE PERSON ACCUSED SHALL BE FURNISHED WITH A TRUE COPY OF THE CHARGES, WITH THE SPECIFICATIONS, AT THE TIME HE IS PUT UNDER ARREST, AND AS the officer empowered to convene a court-martial is to exercise his discretion either to dismiss a com-

plaint against a party or have it investigated by such court, and to direct what portion of the complaint [*i. e.*, the mixture of charges and what is not such] in the event of a trial, shall be embodied or omitted in the charges and specifications PREFERRED BY A COMPLAINANT, THE GENERAL RULE SHOULD BE TO LEAVE THE AUTHORITY OF ARRESTING AN OFFICER [because of the frequent complexity of charges againt officers and the fatal results of variance] TO BE EXERCISED BY THE SUPERIOR WHO MAY ORDER A TRIAL TO TAKE PLACE. [Being thus not yet in arrest:—]

"1213. On the decision of a competent officer to have a party tried by a court-martial, he will cause such charges and specifications against him to be prepared as he may consider proper, and will transmit a true copy of them, with an order for the arrest *or confinement* of the accused, to the proper officer, who, on exhibiting such order to the accused and carrying it into effect by, *if an officer*, receiving his sword, will at that time deliver to him SAID *the* copy of the charges and specifications."

By leaving out the explanations of 1865 and by including imprisoned men in its provisions, Naval Regulations, art. 1778 (*q. v.*), totally changes the apparent, but not the real, meaning of this rule.

12. The Senate Judiciary Committee and, on behalf of commerce, the Senate Committee on Commerce, have unanimously approved and found, sitting in a judicial capacity, the construction of article 43 of the Revised Statutes, 1624, to be as urged by appellee (Senate Reports, 1422, 57th Cong., 1st sess., and 805, 58th Cong., 2d sess.). The merchant marine wants its naval guards so intelligently counseled that the enormous rate of desertion will be decreased (New York Maritime Register, November 9, 16, 23, 2; October 26, 1904).

13. Not a single court-martial order in the War or Navy Department can be found which declines to set aside even

a non-jurisdictional error because the accused soldier or sailor was not lawyer enough to criticise his superiors. To command that they must do this on penalty of imprisonment for "waiver" would be an unwelcome and unfitting doctrine for military discipline.

14. **Attention is especially called** to the argument for claimant in 36 C. Cls., 308–318, which is not included here. Appellee's brief, page 9, reads: "On May 26, the appellee was arrested. The charges show upon their face that they were not prepared and * * * handed to the accused until June 30." It is because appellant admits that only this statement of the charges against the accused was furnished him that this shows that article 43 was not complied with. The quoted passage must not be regarded as a claim that the admiral's version of the charges should have been given the accused when his captain had committed him for trial.

15. A statute is to be construed by the evil it is designed to guard against. Testing Smith's defense (R., 19) by the Navy Regulations, art. 1805, we find that it was written by the prosecutor under orders "not for a moment to forget his duties as prosecutor." Striking out the careful admissions of the specifications which he got Smith to sign, and regarding only what the Navy Regulations, art. 1805, authorized him to include as "facts upon which the defense was based," we find that Smith is thus admitted by the prosecutor to have been on watch from 4 a. m. to 12 m., and, being ordered to unfit himself for his coming night watch from 8 p. m. to midnight by taking an extra watch from noon to 4 p. m.,

that what he really did was to ask to appeal to the captain before needlessly enduring the 12 m. to 4 p. m. watch. He had a right to appeal. (N. R., 54 (9.) Had his appeal been charged as disobedience instead of not doing duty, had he got precise written notice of the important distinction at the time, he could have summoned bystanders to store up in their memories the exact words spoken by him to show that he did not disobey at all. Withholding written charges thus enables interested accusers to deceive, and results in the surprise and conviction of the innocent who are too ignorant, uncounseled, and defenseless to analyze error.

SUMMARY.

Whether one has been put under arrest for trial is, before the confinement has continued ten days, a presumption of fact, determined by the acts or orders of the superior (N. R., 1036). After ten days it is a conclusion of law (art. 24, R. S., 1624).

Any one may "prefer charges" (N. R., 1035). It is the captain's duty to "submit a written statement" of them to his prisoner (N. R., 1034, 1035; art. 71, R. S., 1342). They are framed in formal language by the fleet commander for trial, but they are not originated by him (N. R., 1037, 1038, 1050).

The captain represents the officer ordering the court for the reception and disposition of charges (N. R., 1034, 1036). Charges of which he has had "intelligence" and yet withheld from the accused under him cannot be tried. The seaman is protected by article 43 against his own ignorant waivers.

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